

BOARD OF ZONING APPEALS

Minutes

October 21, 2003

The regular meeting of the Board of Zoning Appeals of the City of Wichita, Kansas, was held at 1:30 p.m. on October 21, 2003, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance:

JAMES RUANE, JOHN ROGERS, JAMES SKELTON, BICKLEY FOSTER, DWIGHT GREENLEE, present.

The following Board members were absent:

RANDY PHILLIPS, and ERMA MARKHAM.

SHARON DICKGRAFE -- Law Department present.

HERB SHANER -- Office of Central Inspection present.

The following Planning Department staff members were present:

DALE MILLER, Secretary.

SCOTT KNEBEL Assistant Secretary.

ROSE SIMMERING, Recording Secretary.

RUANE Item #1, September 23, 2003 BZA meeting minutes.

GREENLEE moves, ROGERS seconds to approve September 23, 2003, BZA meeting minutes with corrections on page 20 and 38.

Motion Carries 5-0.

RUANE Item #2, Case No., BZA2003-49, request variance to reduce the parking requirement from 141 spaces to 73 spaces on property zoned "LI" Limited Industrial and "GC" General Commercial. Applicant, City of Wichita Housing Services Department, Agent, Mark Stanberry, general location, north of 2nd Street North and east and west of Riverview. (307 and 332 N. Riverview)

KNEBEL, Planning staff: Presents staff report and slides. Staff recommends approval, subject to conditions, in the following report:

SECRETARY'S REPORT

CASE NUMBER: BZA2003-00049

OWNER/APPLICANT: City of Wichita Housing Services Department c/o Mark Stanberry

REQUEST: Variance to Section IV-A.4. of the Unified Zoning Code to reduce the parking requirement from 141 spaces to 73 spaces

CURRENT ZONING: "LI" Limited Industrial & "GC" General Commercial

SITE SIZE: 2.14 acres

LOCATION: North of 2nd Street North and east and west of Riverview (307 and 332 N. Riverview)

JURISDICTION: The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five conditions, as required by State Statutes, are found to exist.

BACKGROUND: The City of Wichita is requesting a variance of the Unified Zoning Code to reduce the parking requirement from 141 spaces to 73 spaces for the Housing Services Department offices and the Greenway Manor apartments located north of 2nd Street North and east and west of Riverview at 332 N. Riverview and 307 N. Riverview, respectively (see attached aerial photograph). The property at 332 N. Riverview is developed with an approximately 7,000 square foot office building that houses the majority of the Housing Services Department and provides the 28 parking spaces required by the Unified Zoning Code on the south side of the building. The property at 307 N. Riverview is developed with an 86-unit apartment building for the elderly and 2,592 square feet of office space that houses the remainder of the Housing Services Department. A parking lot south of 332 N. Riverview and east of 307 N. Riverview provides 73 parking spaces to serve the property at 307 N. Riverview. The Board of Zoning Appeals reduced the parking requirement for 307 N. Riverview from 97 spaces to 73 spaces on April 24, 1973 (see attached Case No. BZA 6-73).

The applicant proposes an addition to the south end of the building at 332 N. Riverview to add approximately 4,000 square feet of office space. The addition will consume the land presently used for the 28 on-site parking spaces and will increase the parking requirement for the building from 28 spaces to 44 spaces. The applicant is proposing to use the existing 73 space parking lot currently designated only for the Greenway Manor apartments to serve both the apartments and the expanded office building (see attached site plan). The applicant also proposes that employees of the Housing Services Department will park at the Rounds and Porter building located at 410 N. Waco, approximately one-half block northwest of the office building (see attached aerial photograph),

The applicant submitted the attached letter describing the need for the variance and the manner in which the variance requested meets the five criteria for the granting of a variance. The applicant indicates that the Housing Services Department has a need for additional office and storage space and that expanding the existing building has been determined to be the most feasible and economical method of providing the additional building space. The applicant also indicates that the City of Wichita has surplus parking spaces at the Rounds and Porter building that will be used for employee parking. The applicant further indicates that the actual parking need for the Greenway Manor apartments is significantly less than the 73 spaces provided and that 13 of those 73 spaces are proposed to be used to for customers visiting the Housing Services Department offices with the remaining 60 spaces to be used for apartment residents.

Section IV-A.10. the Unified Zoning Code permits required parking to be located off-site if certain conditions are met. The parking lot at the Rounds and Porter building does not meet two of the required conditions. First, the parking lot is located more than 600 feet, measured along the shortest legal, practical walking route, from the entrance of the office building. Second, the parking lot is located across an arterial street (Waco).

ADJACENT ZONING AND LAND USE:

NORTH	“GC” & “LI”	Office, parking lot
SOUTH	“LI”	Office
EAST	“LI”	Office, parking garage
WEST	“LI”	Park

UNIQUENESS: It is the opinion of staff that this property is unique, inasmuch as the property is located in close proximity to the Central Business District, which does not require on-site parking, and in close proximity (but not as close as required by the Unified Zoning Code) to an off-site parking lot owned by the applicant containing sufficient parking spaces to meet the parking requirement of the subject property. Additionally, the apartment complex is reserved for the elderly and generates a parking need significantly less than anticipated by the parking requirements.

ADJACENT PROPERTY: It is the opinion of staff that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as sufficient parking spaces are available on property owned by the applicant within a reasonable walking distance of the subject property, so adjacent properties should not be negatively impacted by vehicles from the subject property illegally parking on adjacent properties. Additionally, the site plan approved by the Board provides sufficient parking for customers immediately adjacent Housing Services Department, as these visitors would be the most likely to park illegally on adjacent properties.

HARDSHIP: It is the opinion of staff that the strict application of the provisions of the zoning regulation will constitute an unnecessary hardship upon the applicant, inasmuch as the applicant would be required to entirely relocate their operations to a different property at a significant cost if the existing building cannot be expanded on the subject property by the granting of the variance to reduce the parking requirement.

PUBLIC INTEREST: It is the opinion of staff that the requested variance would not adversely affect the public interest, inasmuch as the applicant provides tax-supported affordable housing services for which there is a community need that cannot be met in an economical manner unless the variance is granted.

SPIRIT AND INTENT: It is the opinion of staff that the granting of the variance requested would not oppose the general spirit and intent of the Zoning Code inasmuch as the code provides for parking to be located off-site.

RECOMMENDATION: It is staff's opinion that the requested parking requirement reduction is appropriate if the applicant is required to provide the parking spaces required for the Housing Services Department offices within a 1,000-foot radius of the subject property. Should the Board determine that conditions necessary to the granting of the variance exist, then it is the recommendation of the Secretary that the variance to reduce the parking requirement from 141 spaces to 73 spaces be GRANTED, subject to the following conditions:

1. A minimum of 73 parking spaces shall be provided on-site in general conformance with the approved site plan.
2. A minimum of 44 parking spaces shall be provided off-site and must be located within a 1,000 foot radius of the subject property.
3. An "Agreement for Off-Site Parking" for the 44 off-site parking spaces shall be provided per the provisions of Section IV-A.10.d. of the Unified Zoning Code, even if the parking lot used to meet the off-site parking requirement is owned by the applicant.
4. The granting of the variance supercedes and declares null and void BZA Resolution No. 6-73.
5. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.

MARK STANBERRY, City of Wichita Housing Services Department: The purpose of our request is that we will be consolidating offices. Our department runs Section 8 housing program, homebuyer assistance, and rehabilitation. We did surveys over the summer at Greenway Manor, and the parking was only utilized by 65%. The survey was taken at a time in the morning when tenants were home. We have about 53 citizens/visitors throughout a day.

The 13 spaces, which are close to the building, will be sufficient, and there will be appropriate signage. We also will have payment drop spaces. Employee parking will be provided at Rounds and Porter, and there is adequate space there. The City is willing to sign a restrictive covenant for that site. Tony Utter

expressed a concern about purchase of a parking lot directly north of our building. About three months ago they were not interested in selling those spaces. He was not willing to sign an agreement to lease, and that would not meet the requirements of the UZC. There was also a concern that customers might park in spaces from the other building, and my office is in view of the parking spaces. If we invite people, we will hold those meetings at the Neighborhood City Halls, so there will not be an overcrowded situation from that either.

FOSTER I would agree that 13 spaces should be sufficient. I need some better orientation I am looking at the drawing. Why am I turned around?

STANBERRY Yes, we will add onto the building and take away the spaces.

FOSTER They are etched on the drawing, is the 13 spaces you are talking about?

STANBERRY Right, they are right next to the building and that will be for the customers along the south side of building and two spaces right in front.

FOSTER Bottom of the second page shows a parking lot across from the arterial street.

STANBERRY That is for the employees at Rounds and Porter.

RUANE All employees are to be moved to your new expanded structure?

STANBERRY We're not bringing any new people in, just consolidating office space.

RUANE No, net increase in the number of employees. Any increase in the amount of service that you provide?

STANBERRY Not that we anticipate. The funding has not grown that significantly for the need for additional staff.

MIKE FREDERICK, Building Manager, I have never been through this process before. I think the City has done a good job. I have a tenant that is a dentist who rents spaces 195-197 and the dentist sends me a card 2-3 times a month indicating that his patients are not able to park in the spaces because they are taken by other vehicles.

RUANE How do you know that those are customers from Housing?

FREDERICK There are no other businesses in the area.

RUANE Deductive reasoning is that customers or visitors?

FREDERICK We have 40 spaces labeled visitors. I have seen people park and walk to Greenway Manor.

FOSTER This is now a request from 141 to 73 spaces, on the bottom of page 2 of the staff report it talks about the other problems to the off-site location for parking. Condition #2 takes care of that.

RUANE I appreciate the City has tried to work with the surrounding properties. However, I think it will be a hardship on the other surrounding property owners. I will vote against this because from my observation, the Greenway Manor parking lot is always full.

STANBERRY Right now we have allowed employees to park in that lot, but after this variance they will not be allowed to park in that area.

RUANE There are days in the winter and spring when it is windy, cold, and wet, and human nature is to get the closet spot to the entrance.

FOSTER MOVES SKELTON SECONDS THAT THE BOARD ACCEPT THE FINDINGS OF FACT AS SET FORTH IN THE SECRETARY'S REPORT; AND THAT ALL FIVE CONDITIONS SET OUT IN SECTION 2.12.590(b) OF THE CITY CODE AS NECESSARY FOR THE GRANTING OF A VARIANCE HAVE BEEN FOUND TO EXIST AND THAT THE VARIANCE BE GRANTED SUBJECT TO THE CONDITIONS SET OUT IN BZA RESOLUTION NO. BZA2003-00049.

Motion carries 4-1, and the Board adopts the following resolution:

BZA RESOLUTION NO. 2003-00049

WHEREAS, City of Wichita Housing Services Department c/o Mark Stanberry, (owner/applicant) pursuant to Section 2.12.590.B, Code of the City of Wichita, requests a variance to Section IV-A.4. of the Unified Zoning Code to reduce the parking requirement from 141 spaces to 73 spaces on property zoned "LI" Limited Industrial and "GC" General Commercial and legally described as follows:

Lots 32 and 34 and vacated alley lying between said Lots 32 and 34, on Riverview Avenue, in Waterman's Addition to Wichita, Sedgwick County, Kansas. AND Lot 1, Block 1 and Lot 1, Block 2, Park Plaza Second Addition, Wichita, Sedgwick County, Kansas. Generally located north of 2nd Street North and east and west of Riverview. (307 and 332 N. Riverview)

WHEREAS, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

WHEREAS, the Board of Zoning Appeals did, at the meeting of October 21, 2003, consider said application; and

WHEREAS, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590.B, Code of the City of Wichita; and

WHEREAS, the Board of Zoning Appeals has found that the variance arises from such condition which is unique. It is the opinion of the Board that this property is unique, inasmuch as the property is located in close proximity to the Central Business District, which does not require on-site parking, and in close proximity (but not as close as required by the Unified Zoning Code) to an off-site parking lot owned by the applicant containing sufficient parking spaces to meet the parking requirement of the subject property. Additionally, the apartment complex is reserved for the elderly and generates a parking need significantly less than anticipated by the parking requirements.

WHEREAS, the Board of Zoning Appeals has found that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents. It is the opinion of the Board that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as sufficient parking spaces are available on property owned by the applicant within a reasonable walking distance of the subject property, so adjacent properties should not be negatively impacted by vehicles from the subject property illegally parking on adjacent properties. Additionally, the site plan approved by the Board provides sufficient parking for customers immediately adjacent

Housing Services Department, as these visitors would be the most likely to park illegally on adjacent properties.

WHEREAS, the Board of Zoning Appeals has found that the strict application of the provisions of the zoning ordinance of which variance is requested will constitute unnecessary hardship upon the property owners represented in the application. It is the opinion of the Board that the strict application of the provisions of the zoning regulation will constitute an unnecessary hardship upon the applicant, inasmuch as the applicant would be required to entirely relocate their operations to a different property at a significant cost if the existing building cannot be expanded on the subject property by the granting of the variance to reduce the parking requirement.

WHEREAS, the Board of Zoning Appeals has found that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare. It is the opinion of the Board that the requested variance would not adversely affect the public interest, inasmuch as the applicant provides tax-supported affordable housing services for which there is a community need that cannot be met in an economical manner unless the variance is granted.

WHEREAS, the Board of Zoning Appeals has found that the granting of the variance desired will not be opposed to the general spirit and intent of the zoning ordinance. It is the opinion of the Board that the granting of the variance requested would not oppose the general spirit and intent of the Zoning Code inasmuch as the code provides for parking to be located off-site.

WHEREAS, each of the five conditions required by Section 2.12.590.B, Code of the City of Wichita, to be present before a variance can be granted has been found to exist.

NOW, THEREFORE, BE IT RESOLVED by the Board of Zoning Appeals, pursuant to Section 2.12.590.B, Code of the City of Wichita, that a variance to Section IV-A.4 of the Unified Zoning Code be granted to reduce the parking requirement from 141 spaces to 73 spaces on property zoned “LI” Limited Industrial and “GC” General Commercial and legally described as follows:

Lots 32 and 34 and vacated alley lying between said Lots 32 and 34, on Riverview Avenue, in Waterman’s Addition to Wichita, Sedgwick County, Kansas. AND Lot 1, Block 1 and Lot 1, Block 2, Park Plaza Second Addition, Wichita, Sedgwick County, Kansas. Generally located north of 2nd Street North and east and west of Riverview. (307 and 332 N. Riverview)

The variance is hereby GRANTED, subject to the following conditions:

1. A minimum of 73 parking spaces shall be provided on-site in general conformance with the approved site plan.
2. A minimum of 44 parking spaces shall be provided off-site and must be located within a 1,000 foot radius of the subject property.
3. An “Agreement for Off-Site Parking” for the 44 off-site parking spaces shall be provided per the provisions of Section IV-A.10.d. of the Unified Zoning Code, even if the parking lot used to meet the off-site parking requirement is owned by the applicant.
4. The granting of the variance supercedes and declares null and void BZA Resolution No. 6-73.
5. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.

RUANE Item #3, Case No., BZA2003-52, request variance to permit a restaurant in the Airport Overlay District on property zoned “GC” General Commercial. Applicant, Bagatelle, Inc., c/o Naji Toubia,

Agent, AM Consulting, Inc., c/o Kim Edgington, general location, south of Harry and east of Woodlawn (6801 E. Harry)

KNEBEL, Planning staff: Presents staff report and slides. Staff recommends denial.

SECRETARY'S REPORT

CASE NUMBER: BZA2003-00052
OWNER/APPLICANT: Bagatelle, Inc. c/o Naji Toubia
AGENT: AM Consulting, Inc. c/o Kim Edgington
REQUEST: Variance to Section III-C.5.g.(3)(c) of the Unified Zoning Code to permit a restaurant in the Airport Overlay District
CURRENT ZONING: "GC" General Commercial
SITE SIZE: 0.92 acres
LOCATION: South of Harry and east of Woodlawn (6801 E. Harry)

JURISDICTION: The Board has jurisdiction to consider the variance request under the provisions outlined in Section 2.12.590.B, Code of the City of Wichita. The Board may grant the request when all five conditions, as required by State Statutes, are found to exist.

BACKGROUND: The subject property is located south of Harry and east of Woodlawn at 6801 E. Harry and is zoned "GC" General Commercial. The subject property is currently developed with a vacant commercial building that formerly housed a retail establishment. The applicant proposes to remodel the building to house a bakery and a restaurant.

The subject property is located within the Airport Overlay District. Section III-C.5.g.(3)(c) of the Unified Zoning Code prohibits a restaurant with the Airport Overlay District. Therefore, the applicant is requesting a variance of Section III-C.5.g.(3)(c) to permit a restaurant to be established on the subject property. The applicant submitted the attached statement describing the manner in which the applicant believes the variance requested meets the five criteria necessary for the granting of a variance.

The Airport Overlay District regulates the type and intensity of uses on property located beneath the takeoff and approach paths of McConnell Air Force Base. The purpose of the Airport Overlay District regulations is to protect both the public, and the mission of the airbase, by establishing maximum concentrations of people located beneath the takeoff and approach paths of the airbase.

The Airport Overlay District was established after significant development had already occurred north of the airbase; therefore, numerous non-conforming uses exist within the Airport Overlay District, including a bowling alley, skating rink, night club, apartments, and assisted living facility all located in close proximity to the subject property. Planning staff has been contacted by a representative at the airbase who indicated that the airbase does not object to the proposed use of the subject property given that similar uses are already established in the area.

ADJACENT ZONING AND LAND USE:

NORTH	"B"	Apartments
SOUTH	"GC"	Self storage
EAST	"GC"	Self storage
WEST	"GC"	Carwash, miniature golf

UNIQUENESS: It is the opinion of staff that this property is not unique, inasmuch as the property the property is located within the Airport Overlay District along with thousands of other similarly situated properties that are located beneath the takeoff and approach paths of the airbase. The prohibition on

restaurants within the Airport Overlay District is uniform and does not uniquely apply to the subject property. The need for the variance is caused by the action of the applicant to purchase the property for the purpose of operating a restaurant.

ADJACENT PROPERTY: It is the opinion of staff that the granting of the variance requested will not adversely affect the rights of adjacent property owners, inasmuch as the restrictions of the Airport Overlay District are intended to protect overall public safety and to preserve the viability of airbase operations in the community rather than to protect the rights of adjacent properties.

HARDSHIP: It is the opinion of staff that the strict application of the provisions of the zoning regulation will not constitute an unnecessary hardship upon the applicant, inasmuch as the applicant's claimed hardship is self-imposed by proposing a use of the subject property that is not permitted by the zoning regulations.

PUBLIC INTEREST: It is the opinion of staff that the requested variance would not adversely affect the public interest, inasmuch as a representative at the airbase has indicated that the airbase does not object to the proposed use of the subject property given that similar uses are already established in the area.

SPIRIT AND INTENT: It is the opinion of staff that the granting of the variance requested would oppose the general spirit and intent of the Unified Zoning Code inasmuch as the purpose of the Airport Overlay District regulations is to protect both the public, and the mission of the airbase, by establishing maximum concentrations of people located beneath the takeoff and approach paths of the airbase.

RECOMMENDATION: It is staff's opinion that three of the five the conditions necessary for the granting of the variance do not exist; therefore, it is the recommendation of the Secretary that the variance be denied.

RUANE Does the Air Force or McConnell have any sound proofing factor or construction requirements?

KNEBEL Yes, there are requirements regarding an avigational easement that deals with the type of construction materials that are required in areas that have high decibel levels, but that is not related to this. This is more public safety trying to protect encroachment of incompatible uses or high concentrations of people being underneath approach paths in areas where aircraft accidents are most likely to occur.

SKELTON How is this different from the case that we just heard where the applicant is going to build an addition to a building and thereby creating a need for a variance on parking?

KNEBEL As far as the action the applicant is taking in the last case they are providing parking it is just that they are providing it in a manner that is different then what is required by the Code. They are providing less parking and they are providing it in locations that are further away and across streets that it is not suppose to be provided in. This request the applicant is specifically asking you to do something that is expressly prohibited.

SKELTON It is prohibited in the Airport Overlay District?

KNEBEL They are not asking to be allowed to do something to a lesser or greater extent than what the Code allows it something the Code does not allow and they are asking that the Code be ignored and that they be allowed to do it anyway.

SKELTON Anytime an applicant does something to create a need for a variance it would be counter to any passing of any variance, correct?

KNEBEL You have to look at that to a degree. Obviously the applicant is going to have some hand in creating the need for the variance. It is just whether or not there is something unique about this particular property as opposed to all of the other commercial properties within this Overlay District that necessitates the variance to allow them to do what they are doing. In our opinion it is the same property as the property next door and the zoning regulations have been on them all that it would take is due diligence before purchasing the property to know that it is not a use that is not permitted.

SKELTON How is this different then newly constructed restaurants north of Mid-Continent Airport?

KNEBEL The only Overlay District in the zoning regulations is for McConnell AFB. It has to do with the protection of an airbase as a viable employer.

SKELTON So the use of the Airport Overlay District is a matter of public safety correct?

KNEBEL Right, that is the intention stated in the Code.

SKELTON I don't see any difference with the possibility of an Air Force jet crashing or a commercial airliner here.

GREENLEE How did the Airport Overlay distances and shapes where originally arrived at? Aren't they somewhat arbitrary in where you draw the line? How do you explain the fact that when an airplane comes down it doesn't necessarily come down on an airport or near an airport. Like in the 60's it came down in northeast Wichita. I don't understand an Airport Overlay, and I have been in Airport Planning for over 32 years. I can understand we want to protect the Air Force Base, but at the same time we want to promote businesses and keep those businesses viable in our community. A few years ago we allowed a hospital at the end of a runway at Jabarra. There seems to be subjectivity involved in this Airport Overlay.

MILLER It is my understanding that the boundaries and the shapes are based on statistical analysis of the likelihood. After reviewing actual crashes across the country, that these are the most likely places that aircraft are likely to have a problem is on takeoff and on landing. I don't know if it was restricted to military planes or all planes, but the time that this was approved the Air Force had developed this analysis and these were the most likely distances that planes could have problems and pose a threat to people underneath them.

The other airports do not have public agencies like Congress looking over the shoulders to see whether they are going to close them or not, and because of the economic impact that McConnell has and the likelihood with the base closure reviews, the communities that were taking steps to try and prevent encroachment of incompatible land uses with Air Force Bases were viewed to be communities that tried to work with the Air Force and that was looked upon as a positive step when they reviewed the base closure criteria. Noise complaints is another thing that they take into account as well as just the actual planes crashing and this whole District was developed in a multiple approach not only public safety but it is also to make sure that we protect the ability of McConnell AFB to be able to do the missions that the Air Force asks it to do, because if it can't and it gets restricted to where it is no longer a viable base, they will close it. These are permanent fixed dimensions they are not moving.

RUANE Could the federal government expand?

DICKGRAFE They can according to the Zoning Code. Any changes in the district due to changes in aircraft path patterns and operations will be noted on this map as regulations are amended. So you would still have to have an amendment but if there were significant flight pattern changes then I think based on the Code they would be written into the Overlay. As far as the purpose of the Overlay the Code provides that the purpose is to decrease large numbers of persons underneath runway takeoff and approach paths, where aircraft accidents are most likely to occur and noise levels are inappropriate for urban-density residential and high intensity non residential uses.

FOSTER We are concerned with the McConnell AFB Airport Overlay District. Now the airport also still has it's "AICUZ" (Air Installation Compatible Use Zone) system of overlay on top of this?

KNEBEL That is correct.

FOSTER We are talking about the Airport Overlay and not the AICUZ?

KNEBEL The Airport Overlay District is the Zoning regulation that is requested to be varied. The other is not a Zoning regulation.

GREENLEE The AICUZ is the noise footprint of the overlay.

FOSTER Where do we find in here what uses are allowed?

DICKGRAFE The bottom of page 116, in the UZC.

FOSTER I am wondering how did these non-conforming uses get started out there anyway?

KNEBEL They were established before the Zoning regulation was established. They became non-conforming at the point the regulation was adopted by the City of Wichita.

FOSTER So they are legal non-conforming uses.

KNEBEL Correct.

FOSTER So if we acted today to approve this we would be creating a new non-conforming use?

KNEBEL That is correct, although, it would not be non-conforming, because you would be granting a variance to allow it.

FOSTER I am surprised that we can use a Variance to vary a use rather than a dimension or something like that. You can vary the height of signs or the number of parking spaces or things like that, and there is nothing in there that allows one to vary a use.

KIM EDGINGTON, AM Consulting, This is a unique circumstance. We were instructed that according to the Zoning Code, the BZA is granted the authority to vary any provision of the Zoning Code. First of all I will direct your attention to a memo that was distributed to you this afternoon. It is important to point out that this overlay was established in 1991 when this entire area was completely developed. You don't see very many vacant lots. There were a lot of uses that would not have been allowed. We have listed out several of them, and they have some very high occupancy's.

The building in question used to be B & G Ceramics. When this building was built it was allowed a maximum occupancy of 238 persons. Were a similar type business for instance another ceramic shop to go into that location today, they would only be subject to that same requirement to have a maximum 238 occupancy for that building. So this bakery, Bagatelle Bakery, serves a limited lunchtime menu. Their main function is a bakery. Most of their baking is delivered out to be sold elsewhere. This bakery would only allow 75 persons to be seated. It is a use that will decrease the maximum load of the building.

When our clients purchased this property they did not know that it was in the Airport Overlay District. They did not become aware of that until they went to OCI and were told that a restaurant would not be allowed. This hardship is not self imposed. They did not purchase this property knowing that this use was not allowed. They only found that out quite sometime after the fact. There are numerous uses that could today go into that same site and would be allowed and would be subjected to that maximum occupancy load. We feel that the spirit and the intent is being met by this request by decreasing the number of people on the site. They have outgrown their current site, and they have a limited number of employees. This is not going to impose a danger to anyone.

McConnell AFB has been contacted, and we have spoke with the Base Commander, and they did not see this at all as a problem. This would not have any negative affect on the base operation, and they were supportive of the application. We ask that you recognize that this is very minor in nature. We have several uses around here, one of which occupancy and concentrates over a 1,000 people in a very small space. So the request for 75 persons to be seated in this bakery is very minor in nature.

RUANE You mentioned you spoken to a Commander, and Scott mentioned that they had no objection. Is there a document that you have?

EDGINGTON They have not provided us with any documentation and our time frame was far shorter than any timeframe that they could work within to actually to have written documentation of that. The message that was given to me was that the Base Commander had no problem with this and they saw no negative impact for the Base.

RUANE Who spoke with the base commander?

EDGINGTON Mr. Bayouth is here and he can answer that question.

RUANE Scott, where did you receive your information that McConnell did not object?

KNEBEL The Planning Director talked to a gentlemen named Mike McKay that works for the Air Force who is kind of a Base Planner and he indicated to the Planning Director that the AFB was not going to object to this request.

EDGINGTON They did not bring me into that discussion.

RUANE It was only long after the applicant had purchased this property that they even first learned that there was this restrictions on the property?

EDGINGTON They had purchased the property several months ago, almost a year ago, and they submitted building plans in August.

RUANE Okay, but prior to closing, did they not obtain in sort of title search, or certification, or title insurance?

EDGINGTON They had a zoning check of the property done and that showed that the property was zoned "GC" General Commercial.

RUANE Did they check to see if the person selling it to them had title?

EDGINGTON They obtain title from that person.

RUANE Did they obtain any title insurance, or have any title examination done?

EDGINGTON As far as I am aware there was not a title binder ordered for the property which would have shown any additional restrictions or overlays on the property. It is only through ordering a extended search that would have shown up. This is information given to me by the property owner. The knowledge of the transactions, and that they had done a zoning check through the real estate broker.

RUANE I have never hear of a zoning check before.

EDGINGTON If you call up here to the Planning Department and ask for a zoning check on property they will perform that for you.

RUANE So your contention is that you were given false information by the Zoning classification?

EDGINGTON We do not contend that, no. We just maintain that the only information that they received at the time was that the property was zoned General Commercial. And so that information and along with checking what uses are allowed in General Commercial had them to conclusion that a restaurant is allowed in General Commercial.

SKELTON When did you find out that it wasn't allowed?

EDGINGTON In August when they went and submitted building plans to the Office of Central Inspection.

FOSTER Do you know whether you particular client or real estate broker or whoever made the sale, did they know the intent of your client to put both a bakery and restaurant in here?

EDGINGTON Yes, they were aware that he desired to move an existing bakery that they have on North Pershing.

FOSTER That was known to the person selling the property?

EDGINGTON Yes.

DAVE BAYOUTH, 8420 Huntington, Wichita, KS 67206 The real estate agent did not tell the seller about the airport overlay. I asked the Carlos Mayans, the Mayor, to call the AFB and he did, and the Mayor said that he spoke to them and they did not have a problem with the bakery. We are reducing the occupancy to 75 people, and the majority of them will be employees.

FOSTER I feel this is unfortunate, but the problem lies with the real estate people and the broker. They needed to inform the person purchasing the property. I don't know that there is anything in State Statue that says that we can give a Use Variance.

DICKGRAFE I would agree that this Board cannot create or allow a use. Other Attorneys in my office have advised staff that these types of cases can be heard by the BZA because of the language in the Code that allows BZA to have the authority to authorize in specific cases a variance from the specific terms of these regulations meaning the Zoning Code or other development regulations. Meaning that because he is wanting a Variance or some exception to be made in the requirements for the Airport Overlay, I think it is arguable this Board could hear it. That leaves the applicant with the choice they can't go to MAPC, they can't get an adjustment, which means they would have to go District Court and simply challenge the provisions of the Code.

FOSTER Do you agree that there are court cases in Kansas that do not allow for Use Variances, specifically?

DICKGRAFE Yes, we took out from this Board the authority to do those kind of Use exceptions several years ago.

FOSTER I think this sets a very poor precedence. The idea of the Overlay District is not to prevent people from using this land from the standpoint of maybe employment.

SKELTON I think as far precedence is concerned anytime we do one variance on anything, anywhere in town no matter what it is we are setting a precedence. I can think of all kinds of reasons to approve this variance. The amount of properties that are already there. We have a school there, several restaurants, a gas station, paint stores lots of other retail uses. Some comments about noise it is part of the risks of business. If someone wants to put a business there, they know it is noisy and that is part of their risks. This property is vacant now, and we all know what happens to properties that are vacant over a period of time. They go down hill. Really here, the five criteria that needs to be justified, but I can't find all the five criteria. Can this property be unique because the Base Commander does not object to this restaurant in this location? Or could this property be unique because it is in an Overlay District? If you look at hardship, I can agree with this information provided. Item C seems reasonable and that would be that the property owner would have to buy other property. I am not sure about the real estate agent giving you a bad deal as part of that. The spirit and intent is the one I am struggling with, and I know that we had a variance on that school not to long ago, and the question I have for staff is what did we use for spirit and intent on that one?

KNEBEL They were not expanding the number of students allowed. They were just expanding the foot print of the building, and the reason we said that it was not opposed to the spirit and intent was because they were basically expanding the size of the building more than what was allowed by the Code. It was an extent issue, like you talked about with parking, as opposed to an outright not allowed, yes allow it issue.

EDGINGTON Our response to the spirit and intent would be the fact that currently this building could easily house over 200 people and through the spirit and intent of this application that would greatly decrease the amount of people that potentially could be held in this building.

SKELTON How did that relate to the Overlay District.

EDGINGTON The spirit and intent of the Overlay District is to prevent maximum concentration of people in given locations. The current occupancy rate is 238.

SKELTON What would be a reasonable maximum occupancy that would accommodate this restaurant?

EDGINGTON We have asked for 75 as the maximum occupancy.

SKELTON Perhaps I could agree if the maximum occupancy would be 75 people would not oppose the spirit and intent because that is not very many people in that one location.

DICKGRAFE What is the square footage of you building or bakery going to be?

EDGINGTON The whole building is 15,000 square feet and about 80% of that will be bakery. The seating area for customers is a very limited amount of that building. The majority of their business is baking goods to be shipped out.

FOSTER Evidently somebody passed these regulations years ago, and knew that there were dozens of these buildings out there that were non-conforming. I think the intent here was not to allow anymore non-conforming uses. We make final the determination, and we are here to uphold the regulations of the Zoning Code and we swear to that.

DICKGRAFE This comes down to the Board either being able to qualify with facts the five criteria, and I am not sure I agree with Mr. Skelton that the uniqueness. The uniqueness is generally in reference to the property itself. The Base Commander's comment probably doesn't have to do with the property itself. The spirit and intent can be factually justified in your concentration level, for this particular property is going to lower than perhaps other uses, and you could put a condition on this variance that the occupancy be X amount, which would help you keep that spirit and intent. But I think the hardship and the uniqueness are the two that the Board needs to work on factual basis at this point.

GREENLEE We are here as a Variance Board, and the regulations are clear there is no need to change a regulation. There is no need for a Variance Board. As far as to protect the public I think we have substantial proof that the building has a possible maximum occupancy of 238 people prior to this and now we are asking to reduce it to 100-75 people, so we are protecting the public. We are protecting 75-80 people. How the use of this as a bakery and a small restaurant area for the public would impact the mission of the AFB, I don't think there is an impact to the AFB. So the two reasons given here, we are protecting the public, and I find that we are doing that by reducing the number of people that would use the facility and the AFB personnel has not objected to this, and that would take care of the United States Congress, and that would say we are working in conjunction with the personnel at the AFB. I think we have hardship. I think there is public interest in having this facility used and not sitting there idle. I think we have answered the spirit and intent. I don't see no problem providing a variance and according to this agenda Item we have the authority to that.

RUANE MOVES FOSTER SECONDS THAT THE BOARD ACCEPT THE FINDINGS OF FACT AS SET FORTH IN THE SECRETARY'S REPORT AND THAT ALL FIVE CONDITIONS SET OUT IN SECTION 2.12.590(b) OF THE CITY CODE AS NECESSARY FOR THE GRANTING OF A VARIANCE HAVE BEEN FOUND NOT TO EXIST AND THAT THE VARIANCE BZA2003-00052 BE DENIED.

RUANE I know from experience with the Airport Overlay district, it is a nightmare. I do not believe this property is anymore unique than any other property that is covered by the Airport Overlay District. With regard to hardship, I am surprised, but I do believe the claimed hardship is self-imposed. I think to buy a property without checking to see if there are any recorded restriction on the usage of that property is irresponsible. As far as the public interest goes, I am sensitive to the political needs to keep McConnell satisfied and the many congressional dollars that come into our community. I don't think the public interest is served by granting the variance. As far as spirit and intent, I have heard good discussion on that topic but I do not have a comment on that myself.

GREENLEE SUBSTITUTE MOTION to approve BZA2003-00052.
Substitute motion dies for lack of second.

VOTE ON MOTION TO DENY

3-2 motion carries. (SKELTON AND GREENLEE opposed to denial)

RUANE Item #4, pulled. Item #5 report from OCI.

HERB SHANER Office of Central Inspection, Item #5:

Case No. BZA 2002-00057, Ronald E. Dunn, Anna M. Loehr, Isaac E. and El Dora Neufeld, Damon E. and Kristina D. Baker, Ralph L. Powers, Mitchell and Alice Parent, Lyle A. Banker and Ethel Clark, Dorothy M. Hamlin Johnson, c/o William Cather Attorney at Law, pursuant to Section 2.12.590B, Code of the City of Wichita, request variances to reduce the front setback for a carport on each of 10 separate residential lots, on property zoned “TF-3” Two-Family Residential, generally located in the area of Blake and Palisade. These have been taken care of one way or the other and have been closed out.

Case No. BZA2001-00051, Don Govan, pursuant to Section 2.12.590B, Code of the City of Wichita, request a variance to reduce side yard setback from 6’ to 3’ to permit construction of a garage/workshop on property zoned “SF-5” Single-Family Residential, generally located west of Madison approximately 200 feet south of Stadium Drive. The applicant has done nothing and is not in compliance at this time. No permits have been pulled for the job and it had been left the way that it was two years ago.

SKELTON moves FOSTER seconds to put BZA2001-51 on the Agenda for the applicant’s failure to take action to consider whether the variance should be voided and the Planning Department will let the applicant know because of his failure the variance may be voided.

CARRIES 5-0.

Case No. BZA 2002-00063, Westlink Christian Church, c/o Larry Wren and Justin Ekland, pursuant to Section 2.12.590B, Code of the City of Wichita, requests variances to increase the size of a bulletin board sign for a church from 48 square feet to 84 square feet and allow a portion of the sign to be an LED reader board, generally located south of 21st Street North and west of Maize Road. This variance is in compliance at this time.

MEETING adjourned 3:11 p.m.